office without stating that no member could be found there. On a construction of r. 28 of the Companies (Winding-up) Rules 1909 the relevant part of which is similar to our r. 25(1) quoted above, it was held that the affidavit was insufficient. In other words, in such a situation, the affidavit of service ought to state (if that is the fact) not merely that no officer or servant, but also that no member of the company could be found at the registered office.

In our instant case the affidavit of service made no mention at all about the absence of the company's personnel of the above three categories at the company's registered office. It may be that at the time of service none of them was there or that the server made no attempt to find out whether any of them was present. It would not be right for me to speculate. On the evidence available and for the above reasons, I am constrained to allow the motion. The winding-up order made on 25 September 1992 is set aside.

As regards costs, the company, in my view, is partly to blame for failing to take due and proper steps to effect the cancellation or change of its registered office as required by the Companies Act. In the exercise of the discretion of the court, I make no order as to costs.

PUBLIC PROSECUTOR

v.

ALCONTARA A/L AMBROSS ANTHONY

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL TRIAL NO. 47(58)-39-88]
27 NOVEMBER 1992

DANGEROUS DRUGS: Charge of trafficking in cannabis - Whether plant material seized is cannabis - Section 2 Dangerous Drugs Act 1952 - Whether resin had been extracted from plant - Evidence of chemist that resin had not been substantially extracted - Whether the word substantially can be read into the defining section of the Act - Whether samples taken by the chemist for testing were homogeneous sample of the bulk of plant material seized.

The Accused was charged with trafficking in dangerous drugs, to wit, 70,952.1 gramme of cannabis contrary to s. 39B(1)(a) Dangerous Drugs Act 1952 (the Act). The Accused was arrested following a police ambush and the drugs were discovered in the boot of the car he was driving.

At the trial the chemist gave evidence that the exhibits seized from the Accused was found to be cannabis as defined by the Act and further stated that from the tests that he did he concluded that as there was resin present in substantial amount, the resin had not been extracted.

The question for the court was whether despite the fact that the exhibits were tested in 1987, that is, some years before the Supreme Court decision in *Loo Keck Leong v. PP* which decided that non-extraction of resin from any part of any plant of the genus cannabis is an essential ingredient of the change of trafficking in cannabis, the chemist had consciously and pointedly found that cannabis resin had not been extracted when his primary aim was to detect the cannabis resin, irrespective of the quantity detected, for the sole purpose of driving home the conclusion that the plant material was cannabis.

Defence Counsel also contended that the samples taken by the chemist for testing were not homogeneous samples of the bulk of the plant material seized.

Held:

[1] The cagey and hesitant manner in which the chemist had given his evidence and his answers under cross-examination showed a witness who made a brave attempt to be wise after the event in respect of tests which he carried out about 4 1/2 years before the decision in *Loo's* case.

[2] The chemist could not positively say that the plant samples he had taken and examined, was plant material from which "cannabis resin had not been extracted", as defined under the governing definition.

[3] The chemist opinion that there was "no substantial extraction" of cannabis resin, even if accepted, is not sustainable and is devoid of any rational, scientific or sementical basis nor is it based on the results of any or any proper analysis by him on the presence of cannabis resin in the samples taken for testing.

[4] The chemist had taken 20 random samples, which totalled between 80 to 160 grammes, from the mass of plant material seized. The gross weight of all the samples weighed in excess of the 50 grams threshold required to trigger the operation of s. 39A(2) of the Act.

[5] The essential ingredient of the charge that the plant material seized was cannabis as defined under the governing definition in s. 2 of the Act has not been made out by the prosecution at the end of its case. This essential ingredient of the change being absent, would even if unrebutted, not warrant a conviction.

[Accused acquitted and discharged without being called to enter his defence.]

Cases referred to:

Penang Trial No. 47(58)-2-86 [1993] 1 CLJ 78 ***(foll)***
Loo Keck Leong v. Public Prosecutor [1992] 2 MLJ 177 ***(foll)***
PP v. Loo Keck Leong [1991] 3 CLJ 2584 ***(refd)***
Shamsuddin bin Hassan & Anor. v. PP (Ipoh High Court Cr. Trial No. 58-6-86) ***(refd)***
Ladbroke (Foothall) Ltd. v. William Hill) Ltd. ***(refd)***
Palser v. Grinling and Property Holding Co. Ltd. v. Mischeff HL (E) [1947] p. 291 ***(refd)***

Legislation referred to:

Dangerous Drugs Act, ss. 2, 39A(2), 39B(1)(a), 39B(2)

For the Accused - Karpal Singh; M/s. Karpal Singh & Co,
For the Public Prosecutor - Wong Teck Meng, DPP

JUDGMENT

Vincent Ng Khim Khoay JC:

The Accused is charged as follows:

> Bahawa kamu pada 11 Ogos 1987 jam lebih kurang 5.30 pagi di Jambatan Permatang Tok Labu, Kepala Batas, Seberang Perai, dalam Daerah Butterworth, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu 70,952.1 gram ganja dan kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The prosecution adduced the following evidence:

Acting upon information that there would be a conveyance of drugs by a male Indian in a dark blue Mitshubishi Colt Gallant bearing registration No. WBE 2789 (the said car) from Permatang Bendahari towards the direction of Pulau Pinang, PPP Abdul Wahab bin Embong (PW3) and Insp. Mohd. Amin bin Abdul Raof (PW4) together with five other police officers proceeded in a van and a car and took up various ambush positions at 4.00 a.m. on 11 August 1987 on both sides of the Bailey bridge (the said bridge) in Permatang Tok Labu, Kepala Batas, Seberang Perai, District of Butterworth, State of Pulau Pinang. The said bridge was then under repair and because there was a row of drums placed on one side of the bridge the same could only take, single lane traffic.

On both banks of the said river where the bridge spans were street lights, which, according to the witnesses, permitted clear visibility of the area in the vicinity of the bridge. At about 4.50 a.m. on the same morning they saw a dark blue Mitshubishi Colt Gallant car driven by, what appeared then to be a man, moving over the said bridge from the direction of Penaga and heading towards the direction of Permatang Bendahari. They continued to wait. Later, at about 5.25 a.m. they saw the same car bearing registration No. WBE 2789, returning from the direction of Permatang Bendahari towards Permatang Tok Labu (that is, also towards Penaga) and approaching the said bridge. They then stopped the said car on the bridge, with

the aid of drums placed in its way. It was PW4 who stopped the said car, opened its door, pulled the car-key out of the ignition keyhole and handed same to PW3 who was then beside him. The Accused was the driver of the said car wherein there were no passengers.

Then, PW3 identified himself to the Accused as a police officer and instructed the Accused to proceed to the boot of the said car. Upon the instructions of PW3 the Accused himself opened the said boot with the car key (earlier seized from him) that was handed back to him by PW3.

In the boot of the said car, the police officers found eight packages containing tightly packed plant material (P3 to P10) suspected (then) to be cannabis. All the eight packages were individually wrapped with double, or triple or quadruple layered large transparent plastic packets (P3B to P10B) (hereinafter called the eight packages). The Accused was then arrested, and the passenger compartment of the said car and his person was searched. From this search, nothing incriminating was found, save that on the Accused's person a wallet was recovered, which contained an identity card and a driving licence, both bearing the name of the Accused. A sum of RM63 of paper currency and several other items of little significance to the charge were also found in the wallet. The Accused was then taken to and arrived at the police station, Kepala Batas at 6.30 a.m. PW3 then lodged Kepala Batas Report No. 2882/87 on the aforesaid arrest.

Encik Mohd. Jaafar bin Uda Umor (PW2) the officer in charge of vehicle registration records for Federal Territory testified that from his records a blue coloured Mitshubishi Colt Gallant car bearing registration No. WBE 2789 was, with effect from 12 March 1986 as well as on 11 August 1987, registered in the name of one Aneeallzevet a/p Stephen, who later gave evidence as PW6.

Puan Aneeallzevet a/p Stephen (PW6) said that she was, on 11 August 1987 and until the day of the trial, the wife of the Accused. She had purchased the said car with the deposit solely borne by her, and the monthly instalments thereon were paid jointly by her and the Accused from the monthly income earned from the coffee stall operated by both of them. She also testified that on the day previous to her husband's arrest, he was at home with her the whole day until about 7.00 p.m. when he went out alone with the said car WBE 2789. That was the last she saw of him until she was informed of his arrest. It is perhaps relevant here to bear in mind that the Accused was the sole occupant of said car at the time of his arrest.

At the close of the case for the prosecution, I was satisfied on a *prima facie* basis that the Accused was in control and custody of the said eight (8) packages seized from him and there was no break in the chain of handling of such exhibits from the time of such seizure until they were produced in Court. Save for the issues for judicial determination discussed hereinafter, the learned DPP had hitherto conducted a faultless prosecution of the case.

The only question I have to decide at this stage in the proceedings, upon a point taken by the defence Counsel Mr. Karpal Singh, is whether the plant material is "cannabis" as statutorily defined under s. 2 of the Act. Another point taken by the defence Counsel is that the samples taken by the chemist from the eight packages for testing were not homogeneous samples of the bulk of plant material seized. On this point I hold that, as the chemist had said that he had taken 20 random samples from each of the eight packages, which totalled between 80 to 160 grams from the total mass of plant material seized - though he made no record of the actual weight of the samples taken - and as such, the gross weight of all the samples he took weighed in excess of the 50 grams threshold required to trigger the operation of s. 39A(2) of the Act, the defence Counsel's challenge on this score is untenable. See also my decision in the case of *Penang Trial No. 47(58)-2-86 (See [1993] 1 CLJ 78)* on the relevance of such challenge as to the homogeneity of samples taken, in cases where the charge involved huge amounts of heroin seized.

Though the chemist Mr. Tai Teik Siew (PWl) had said in his evidence that he had examined the plant material and had found same to be 70,952.1 grams of cannabis, and he further said that, to quote:

> The cannabis mentioned by me above is as defined in the Dangerous Drugs Act 1952,

this assertion was strenuously challenged by the defence Counsel.

In his evidence, PW1 had acknowledged that the celebrated Supreme Court decision in *Loo Keck Leong v. Public Prosecutor* [1992] 2 MLJ 177 (the decision in *Loo's* case) had been brought to his notice before he gave evidence. In the witness stand he gave the Court the impression of a chemist testifying under siege, who was unduly and overly eager to dovetail his purported test-finding with the said decision in *Loo's* case.

On the issue of cannabis resin he had this to say in his examination-in-chief and I quote:

> With the combination of all the four tests and not by individual tests alone, I concluded that the plant material was cannabis where resin had not been extracted

and he also said:

> I do not know how much of resin was originally there. To me, extraction of resin means complete or substantial and since the resin was present in substantial amount I say that there was no extraction.

Yet, it is inconceivable - and I am unable to accept - that the quantitative extent of the presence of cannabis resin in the plant material was his central or essential consideration at the time he tested the plant material samples taken from P3 to P10, especially as same was tested some time between 14 August 1987 (when he received them from PW8) and 4 December 1987 (when he returned same to PW8), that is, some years before the 24 April 1992 decision in *Loo's* case. As such, it is equally incredible that he had, at the material time, consciously and pointedly found that cannabis resin had not been substantially extracted. What is indeed probable is that as he had done his analysis before the cannabis resin issue saw the light of day, he had dutifully and with similar frame of mind, carried out and performed the similar standard tests employed by other chemists in *PP v. Loo Keck Leong* [1991] 3 CLJ 2584 and *Shamsuddin bin Hassan & Anor. v. PP* (Ipoh High Court Cr. Trial No. 58-6-86) and had made similar findings on such standard tests adopted by all government chemists, as commonly repeated in their evidence in every drug trial. Their essential and primary aim then was to detect the presence of cannabis resin in the plant material, irrespective of the quantity detected, for the sole purpose of driving home the conclusion that the plant material was cannabis. It is worthy of note that quantitative tests on cannabis resin in such plant material were tests then alien to such chemists. One may ask, have we heard from PWl, a different tune in Court? Indeed the essence of the findings of the learned Judges in both the aforesaid cases (and now expressed in the recent amendment on the definition of cannabis under Dangerous Drugs (Amendment) Act A834 of 1992) are consistent with the acceptance of the chemists' detection of cannabis resin, irrespective of quantity (this point being then a non-issue) as one of the confirmative or conclusive tests that the plant material was cannabis. After the decision in *Loo's* case, this would be uncomfortably close to the said amended definition.

The cagey and hesitant manner in which PWl had given his evidence and his answers under cross-examination gave me the impression of a witness who had made a brave attempt to be wise after the event in respect of tests which he carried out about $4^1/_2$ years before the decision in *Loo's* case; the precise findings on which tests he now tries to relate from memory. He said that there are two ways of extraction of resin, being:

(a) by mechanical means; whereby the plant material is thrashed against a hard object, and this method being deliberate, would have destroyed the plant structure whereas he observed that the plant structures were still intact. Yet, he had also admitted that light thrashing of the plant material would remove some resin and such light thrashing would not change the physical integrity of the plant structure.

(b) by chemical solvents; whereby the resins would have been completely or substantially removed from the plant material, but as his tests showed that the resins were still present in abundance, he concluded that no extraction by organic solvent had been carried out on the plant exhibit. Yet, he had also said that if the solvents had been used on the plant material for the extraction of resin all his above tests would not show the presence of the solvent and he did not carry out any quantitative tests on the resin present inside and outside the plant material he examined. It would seem strange and incredible that he had at that material time

looked for the abundance of resin in the plant material he examined when such a factor was then quite irrelevant to him as a chemist. As there were no colour charts to guide him in his Thin Layer Chromotography test, the abundance of resin he claimed to have found by way of colour tone seen could, at the very most, only be his subjective opinion. Furthermore, considering the passage of time since his tests, it is remarkable that he made no reference to any working notes or entries in his papers to confirm his purported test-finding on this currently vital issue of the quantitative presence of cannabis resin; the ingredient "being a matter of science and not being a question of ordinary fact normally perceivable by the senses ..."
(See the decision in *Loo's* case.)

Even on the sum total of his evidence, he did not and could not say that, from the samples he tested, P3 to P10 were plant material from which cannabis resin had not been extracted. At the highest watermark of his evidence he only said that they were plant material from which resin had "not been completely or substantially extracted".

When questioned by the Court as to how he could conclude that there was no substantial extraction of the resin when he was totally without a clue as to how much cannabis resin was extractable from the samples he took from P3 to P10 - bearing in mind that he had not done any quantitative tests for the presence of cannabis resin in such samples - he was unable to give any satisfactory explanation.

In *Loo's* case, the Supreme Court had made an eminently perceptive decision on a novel issue which had hitherto escaped the attention of the best legal brains in the country. The *ratio decidendi* in this decision being that the non-extraction of resin from any part of any plant of the genus cannabis is an essential ingredient of the charge of trafficking in cannabis.

Following this decision, s. 2 of the Act which reads as follows:

> 'cannabis' means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated; (Sub. Act A553)

the governing definition) was, by virtue of Dangerous Drugs (Amendment) Act A834 of 1992 amended to:

> 'cannabis' means any part of any plant of the genus Cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated (the amended definition).

Mr. Karpal Singh had also submitted that as the word "completely" ought not to be read into the phrase "resin has not been extracted" (before the word extracted) in the governing definition, the word "substantially" should, by the same token, also not be read into this definition. He further submitted that the issue of substantial extraction had not been pointedly decided in the said decision in *Loo's* case; it was only by way of an *obiter dictum*. On this point, I would agree for the reason, *inter alia*, that the chemist had said during the trial of Loo Keck Leong that, though he was not able to tell if the plant material had undergone any cannabis resin extraction process, he found that the presence of cannabis resin was not merely as a trace residue. He said, to quote:

> it needs quite a bit of the presence of cannabis resin to give a positive reaction.

This was the positive reaction he found in the Dequinois Levine test he did on the seized plant material. His expression "quite a bit" would appear quite close to the meaning of the word "substantial" used by PWl in the current case, considering that both expressions lack precision.

It is this question of substantial extraction of cannabis resin which has given rise to a difficulty in this Court. In my opinion, by the separate but close juxtaposition of the definition of "cannabis" and of "cannabis resin" in s. 2 of the Act, the legislature had clearly intended to make a distinction between the offence of possession or trafficking in cannabis resin on the one hand and cannabis plant in its natural state, in wet or dried (but untempered by any extraction process) form on the other hand. This would explain the phrase used in the governing definition being expressed as "plant ... from which resin has not been extracted ..."; it being so expressed, to bring within its ambit, e.g. a seizure of freshly harvested green cannabis plants. I am fortified in

this construction as PWl had also admitted under cross-examination that "ganja plant can be planted in our Malaysian climate and I have received samples from the police of live plants found in this area". He also said "I have examined a growing ganja plant. That would be an ideal state of the plant where the resin had not been extracted at all."; an ideal state of a plant that fits perfectly the governing definition.

What is left for judicial determination is, what is meant by the word "substantial". Substantial indicates a matter of real substance, far more than that which could be termed as "mere presence". It is an unsatisfactory medium for carrying the idea of some assertainable proportion of the whole, when the whole is known. Substantial is not a word with a fixed meaning in all contexts. It may be used to indicate worth or stability. Used in a comparative setting, 'a substantial part' as against 'the remaining part', it suggests a dichotomy into the substantial part, and the non-substantial, a contrast, according to cubic contents, or area, between the greater and the less, as between the essential and the subordinate or incidental. Under the English Copyright Act, it was held, on the issue of whether there was substantial reproduction of the original by the defendant, the word "substantial" ought to be decided by the quality rather than the quantity of the reproduction. See *Ladbroke (Foothall) Ltd. v. William Hill Ltd.* Whereas in respect of virtually all other matters, the word "substantial" is predicated or premised on the availability of an ascertainable whole amount or quantifiable gross quantity e.g. under the English Rent Restrictions Act, the question whether the amount of rent, which is fairly attributable to the use of the landlord's furniture in the demised premises, forms a substantial portion of the whole rent for the demised premises, would necessitate a comparison of such rent - when ascertained - with the amount of the whole rent. See the Privy Council case of *Palser v. Grinling and Property Holding Co. Ltd. v. Mischeff* HL (E) [1947] p. 291.

As the ingredient (cannabis resin) is a matter of science and not a question of ordinary fact normally perceivable by the senses (see decision in *Loo's* case), could the chemist in the present case, justifiably opine that cannabis resin had not been substantially extracted - which would logically entail his having discovered that there was still substantial quantity of resin present in the plant material - when he had also acknowledged that he did not quantify the whole or total amount of cannabis resin extractable from the samples of the plant material he had examined. As he had also not carried out any tests to determine the proportion of resin found inside as opposed to outside the plant material, his statement that more resin is normally found outside rather than inside the plant material could not be anything more than a bare assertion. Data such as the total amount of cannabis resin extractable from a given plant material are indeed ascertainable, irrespective of the geographical origin of the plant material, though this may not be a very practicable endeavour.

For all the above reasons, I am of the view that the recent amendment makes for good practical sense, despite its critics, as it avoided the use of the word "substantial" in the amended definition. It may be permissible to speak of a substantial fortune, a substantial meal or a substantial man, but is it permissible to speak of a substantial presence of cannabis resin, the ingredient being a matter of science?

As such, I hold that:

(a) as PWl could not positive by say that the plant samples he had taken from P3 to P10 and examined by him, was plant material from which "cannabis resin had not been extracted", as defined under the governing definition; and

(b) his opinion that there was "no substantial extraction" of cannabis resin as expressed in his evidence, even if accepted by me (which I do not), is not sustainable and is devoid of any rational, scientific or semantical basis; nor is it based on the results of any or any proper analysis by him on the presence of cannabis resin in the samples taken from P3 to P10;

the essential ingredient of the charge that the plant material seized was cannabis as defined under the governing definition in s. 2 of the Act has not been made out by the prosecution at the end of the prosecution case. This essential ingredient of the charge being absent, would, even if unrebutted by the defence (say, should the Accused remain silent when called to enter upon his defence), not warrant a conviction.

On the grounds aforesaid, and pursuant to s. 180 of the Criminal Procedure Code, I hereby

acquit and discharge the Accused without calling him to enter upon his defence.

As my decision here would involve potential repercussions on several other pending cases in the country involving cannabis, under the governing definition of cannabis, I have taken pains to ensure that this judgment and the notes of evidence are made available to the DPP forthwith today so as to expedite an appeal by the Public Prosecutor, if so decided.

PUBLIC PROSECUTOR
v.
JAMLONG MANMOOL

HIGH COURT, BRUNEI
DATO' SIR DENYS ROBERTS CJ
[CRIMINAL TRIAL NO. 4 OF 1992]
22 SEPTEMBER 1992

CRIMINAL LAW: Rape - Section 375, Penal Code - Consent - Admission of defendant of sexual intercourse with complainant - Whether with consent: aggravated rape - Section 376(2), Penal Code - Whether case of aggravated rape: sentence - Ordinary rape - Appropriate sentence in the circumstances.

EVIDENCE: Burden on prosecution - Whether discharged - Corroboration - Whether sufficient - Section 157 Evidence Act.

The defendant was charged under s. 375 of the Penal Code with rape of the complainant. The complainant alleged that on the night of 26 April 1992, when she was walking back home from the house where the defendant lived, the defendant had waylaid her and had dragged her into the jungle and raped her. She had struggled and shouted for help at first, but had to keep quiet when the defendant threatened to take her deeper into the jungle and kill her.

The complainant reported the incident to the police on 27 April, 24 hours after the incident, she was examined by a doctor on 28 April, who saw a bruise on her thigh. The doctor took three smears and sent them for analysis. The shorts worn by her at the time of the incident too were sent for forensic examination. Swabs of semen found on the shorts were taken. Forensic evidence established that the complainant had had sexual intercourse within 48 hours before the smears were taken. The semen found in the crutch of the shorts were matched with the profile of blood taken from the defendant, and the semen and the blood were found to have come from the same person.

The defendant at first denied in court having sexual intercourse with the complainant on the night of 26 April 1992, though admitting to sexual intercourse with her on two other occasions, before the incident, but later admitted to having sexual intercourse with the complainant on the night in question, claiming that it was with the consent of the complainant.